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UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHWEST METALS COMPANY, :
a corporation, :
 :
Plaintiff in Error, :
 :
vs. : No.4445
 :
FRANCISCO GOMEZ, :
 :
Defendant in Error. :

Upon Writ of Error to the United States
District Court of the District of Arizona.

ADDITIONAL POINTS AND AUTHORITIES OF
PLAINTIFF IN ERROR IN REPLY TO BRIEF OF
DEFENDANT IN ERROR

ANDERSON, GALE & MILLER
Attorneys for Plaintiff in Error

Filed this _____ day of _____, 1925.

FRANK D. MONCKTON
Clerk

By _____
Deputy Clerk

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SOUTHWEST METALS COMPANY,
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Plaintiff in Error,

vs.

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No. 4445

ADDITIONAL POINTS AND AUTHORITIES OF
PLAINTIFF IN ERROR IN REPLY TO BRIEF
OF DEFENDANT IN ERROR

If it is the wish of the Court,
and their pleasure, we would be pleased
to have them consider the following
points and authorities in reply to
defendant's brief, for the reason that
Defendant in Error raised a number of
new matters in their Reply.

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF THE HISTORY OF ARTS
AND ARCHITECTURE
CHICAGO, ILLINOIS
1915

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than a druggist, who fills a prescription, or a massuer, who carries out certain orders of the physician, or a waiter, who carries in the tray of food, acting under the orders of the physician. The mere fact that she is acting under the directions of the physician does not make her an assistant, or his agent, within the law.

Defendant in Error cites Wigmore on Evidence. We are very happy that they did so. This whole question is treated by Wigmore, Second Edition, Volume 5, Sec. 2380, 2381 and 2382. Reference to this was made in our original Brief, and we quote from Paragraph 2382, which does not in any way support Defendant in Error, but we think clearly the opposite:

"The confidence which is protected is that only which is given to a professional physician during a consultation with a view to a curative

That is, the only way to get a
good result, in a manner, and
the result is to be applied,
by a person, who is able to do
it, and, using only the water of
the system. The more that the
is added to the system of the
system, the more it is added.
and, in the end, which is the
system is then the same.

As a result, the only way to
get a good result, in a manner,
and the result is to be applied,
by a person, who is able to do
it, and, using only the water of
the system. The more that the
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system, the more it is added.
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system is then the same.

The result is that the only
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it is added, and, in the end,
which is the system is then the
same.

treatment; for it is that relation only which the law desires to facilitate.

(a) Hence, the person consulted must be a professional physician, in the usual sense of the word. This does not include a veterinary surgeon; nor a pharmacist; nor a nurse, or other skilled auxiliary practitioner. Nor does it include a dentist;"

A nurse is not skilled in medicine, as an assistant physician, or as an assistant surgeon. She carries out the orders of the doctor, as to treatment, as to the doing of certain things. There is no confidential relation between the patient and herself, in the sense that the law contemplates.

Counsel for defendant stresses the proposition that we overlooked paragraph 5551 of the Statutes of Arizona. We were very mindful of this section and made no such contention as stated by counsel, for

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a strict construction of our statute,
but to the contrary our statement was:

"Our statute, being in
derogation of the Common
Law, and while liberally con-
strued, it cannot be extended
beyond the plain terms of the
statute".

We also were mindful of the
following section of the Statute of
Arizona, to-wit: Paragraph 5552,
first section thereof, which pro-
vides that words: "which have ac-
quired a peculiar and appropriate
meaning in the law shall be con-
strued and understood according to
such peculiar and appropriate mean-
ing". The words "physician and
surgeon" certainly have a peculiar
and appropriate meaning in the law,
as used in our statute, and there-
fore must be understood and con-
strued according to that peculiar
and appropriate meaning, and such

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fact that the railway was working well

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meaning does not include the word "nurse", or "assistant", or "agent", or "dentist", or "druggist", or any other person, save and except a physician or surgeon.

We also call attention to Section 5555 of the Arizona Code.

II

Defendant in Error takes the position that testimony given on cross-examination by the plaintiff is not voluntary testimony. We think such a proposition is answered by a mere statement as follows: If such testimony is elicited by competent cross-examination, (that is to say, upon matters and things brought out in chief and within the rule as to cross-examination), then it is just as voluntary as if brought out in direct examination. We feel that no authority can be found in support

of any other position than this. To permit a witness to give his story and then not permit competent cross-examination of the matters and things brought out, for the reason that he would be giving involuntary testimony, appears to us as more than ridiculous.

III

Defendant claims that the Egich decision, 22 Arizona, 543, lays down a rule which is adverse to our position in this case. We take the position that the Egich case is a strong authority in favor of our position taken under Assignments No. I and II. While the Arizona Court did disagree with the Supreme Court of the United States, as to inherent risks and hazards, yet they laid down the rule, not only once, but several times, and emphasized

The first thing I noticed when I stepped
 out of the train was the cold air.
 It was a relief, a welcome relief.
 I had been in the city for days,
 and the heat was unbearable.
 The air here was crisp and clear.
 It was a good start to my journey.
 I had heard that the weather was
 perfect here, and now I knew it was
 true. The sun was shining brightly,
 and the birds were singing.
 It was a beautiful day, and I
 was glad to be here.

III

The next day I went to the market.
 It was a busy place, with people
 buying and selling everything from
 fresh produce to handmade goods.
 I was interested in the local
 specialties, and I saw some things
 I had never seen before. The
 vendors were friendly and helpful,
 and I was able to find exactly
 what I needed. The market was
 a great experience, and I was
 glad to have it. I had heard that
 the market was the best place to
 go, and now I knew it was true.
 The market was a wonderful
 place, and I was glad to have
 it. I had heard that the market
 was the best place to go, and
 now I knew it was true. The
 market was a wonderful place,
 and I was glad to have it.

it, that the liability arose when the injury was caused by an accident due to a condition, or conditions, of the occupation, including all of these accidents, from whatever source, SO LONG AS THE ACCIDENT CAUSING SAID INJURY WAS DUE TO A CONDITION OF THE EMPLOYMENT. The accident must be due to the condition, the injury must be due to the accident. This certainly does not hold that an infection resulting from some other source than a condition of the employment can be recovered under our Employers' Liability Law. This authority supports the position that the employee must allege and prove that the injury was occasioned by the accident and that the accident was occasioned by a condition of the employment. In this connection we desire to call the Court's attention to 58 Federal, page 945 cited by defendant, upon this question, that the infection, not being a result

THE HISTORY OF THE UNITED STATES OF AMERICA
FROM 1763 TO 1863
BY CHARLES C. SMITH
NEW YORK: HARVARD UNIVERSITY PRESS
1911

defendant is not liable.

We call the Court's particular attention to page 954 of this Opinion, cited by defendant, where the Court says:

"We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause."

IV

Defendant cited 25 Arizona, 158, as being a case identical with the present one, upon the question of privileged communication. We call attention to the fact that in the Garcia case, 25 Ariz. 158, the

CHAPTER I. THE EARLY HISTORY OF THE UNITED STATES

SECTION I. THE DISCOVERY OF AMERICA

SECTION II. THE EARLY SETTLEMENTS

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SECTION III. THE EARLY SETTLEMENTS

SECTION IV. THE EARLY SETTLEMENTS

SECTION V. THE EARLY SETTLEMENTS

SECTION VI. THE EARLY SETTLEMENTS

SECTION VII. THE EARLY SETTLEMENTS

SECTION VIII. THE EARLY SETTLEMENTS

plaintiff's brother testified to certain things, which they did not permit the doctor to contradict. We place emphasis upon the words "plaintiff's brother", not the plaintiff who had testified, and who, in this case, we seek to contradict. We feel that the distinction is very clear.

v

In support of their position sustaining the lower Court in refusing to permit the hypothetical question to be asked, under our Assignments No. 9 and 10, they cite 58 Federal, 945. A simple reading of this opinion will show that it has no application to the question here involved. This is further borne out by the fact of the citation of this authority in the case of Motey vs. Pickle Marble & Granite Co. 74 Fed.155, upon

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the question of opinion evidence.

The real rule is laid down in 11 Ruling Case Law, cited by us in our Opening Brief, but this case is very interesting for the quotation cited upon another phase of this case, and we thank Defendant in Error for calling our attention to it.

VI

We cannot refrain from calling attention to the fact that Defendant in Error believed that the Indiana Supreme Court decided the *Honnyack vs. Prudential Insurance Company* case, 87 N.E. 769, cited in our original Brief, while in fact it was the New York Court that decided the case, and the New York statute was in question, and we hope they are not as far afield in their ideas of the case as they were as to the source from whence it came.

Defendant in Error labors to show that the credibility of a witness who has not been impeached, cannot be attacked. Certainly, no one contends to the contrary, but we wish to point out there is a great difference between the credibility of a witness and the interest, or lack of interest, and the bias or prejudice of a witness. In practically every jury trial instruction is given to the jury which covers this old familiar rule, to-wit: that the jury has a right to take into consideration the interest, or lack of interest, or the bias or prejudice, if any, shown by each and every witness, the witness's knowledge and means of knowledge, etc. This is a very familiar and ancient rule that you have a right to prove that

The first of these is the fact that the
 world is not a simple machine, but a
 complex system of interacting parts.
 The second is the fact that the
 world is not a static system, but a
 dynamic one, constantly changing and
 evolving. The third is the fact that
 the world is not a uniform system, but
 a heterogeneous one, with different
 parts and regions having different
 characteristics. The fourth is the
 fact that the world is not a closed
 system, but an open one, with
 constant exchange of matter and
 energy with its surroundings. The
 fifth is the fact that the world is
 not a deterministic system, but a
 probabilistic one, with events
 occurring in a way that cannot be
 predicted with certainty. The sixth
 is the fact that the world is not a
 linear system, but a non-linear one,
 with small changes in input leading
 to large changes in output. The
 seventh is the fact that the world is
 not a simple system, but a complex
 one, with many different levels of
 organization and interaction. The
 eighth is the fact that the world is
 not a uniform system, but a
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 characteristics. The ninth is the
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 constant exchange of matter and
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 tenth is the fact that the world is
 not a deterministic system, but a
 probabilistic one, with events
 occurring in a way that cannot be
 predicted with certainty.

a witness has an interest, or a lack of interest, in the subject matter in controversy. This is entirely different from attacking the credibility of a witness. This lack of interest and this interest, we certainly had a right to show.

VIII

They pass by our objection to the testimony of the physician as to occupational blindness, with the statement that impairment of earning capacity may be shown under an allegation of permanent disability. There is no doubt of that but occupational blindness would be prejudicial testimony, as a jury might think that he was unable to do any work. Such occupational blindness is not contemplated under our statute. They have a right to show total disability. They have a right to show impairment

The first part of the book is devoted to a
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 govern the construction of the
 various parts of the book. The second
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LIII

The third part of the book is devoted to a
 study of the history of the subject, and
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 various parts of the book.

but they have no right, in the absence of law relative to industrial or occupational blindness, to bring in such testimony under our law. We feel sure that the Court will understand why this Assignment of Error was made, upon an examination of our statute and the pleadings in the case.

IX

In conclusion we want to call attention to the fact that our privilege statute, as to communications of physicians and surgeons, was taken from the State of Kansas, and under the familiar rule that we should be bound by the construction placed upon the statute by the Courts of the State from whence it was taken, we call attention to the case of

Kansas Ry. vs. Murray
40 Pac. 646

Armstrong vs. Topeka Ry..
144 Pac. 847

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Kansas, first, had a statute identical with ours as it now stands, and the privilege extended to any physical, or supposed physical disease, or any knowledge obtained by personal examination, etc. Later, the legislature of Kansas included the words "defects or injuries", after the word "disease", clearly showing that it was the intention of the legislature, in the first instance, to include disease, only, and not injury. If that construction is adhered to then physicians are not privileged as to any injuries and only as to disease, or supposed disease, but another interesting point would be observed in the construction of this statute by this Court in the Armstrong decision where they hold, (and we direct particular attention to page 859, 144 Pac. par. 3);

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 UNITED STATES OF AMERICA
 FROM 1763 TO 1876
 BY
 CHARLES A. BEAN

NEW YORK:
 HENRY HOLT AND COMPANY,
 PUBLISHERS,
 15 NASSAU ST. (OPPOSITE
 TRINITY CHURCH)

1876

"This statute, in its terms, will not be extended by implication, or by interpretation, but will be strictly construed in favor of the COMPELMENT of the witnesses".

Respectfully submitted,

L. Roy Anderson
Alfred H. Gale
Henry H. Miller
Attorneys for Plaintiff
in Error

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